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No. 89-59

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

WILLIAM M. SPIGAROLO,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

IS THE SIXTH AMENDMENT RIGHT OF FACE-TO-FACE CONFRONTATION VIOLATED WHEN A CHILD SEXUAL ABUSE VICTIM IS PERMITTED TO TESTIFY VIA VIDEOTAPE AND IN THE ABSENCE OF THE DEFENDANT, BUT ONLY WHEN THERE IS CLEAR AND CONVINCING EVIDENCE THAT THE CHILD WOULD BE SO INTIMIDATED OR OTHERWISE INHIBITED BY THE PHYSICAL PRESENCE OF THE DEFENDANT THAT THE TRUSTWORTHINESS OF THE CHILD'S TESTIMONY WOULD BE SERIOUSLY CALLED INTO QUESTION?

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OPINION BELOW

The opinion of the Connecticut Supreme Court appears at 210 Conn. 359, 556 A.2d 112 (1989), and is reproduced in the Petitioner's Appendix at A-1 through A-44. The Connecticut Supreme Court's unpublished order denying rehearing is reproduced in the Petitioner's Appendix at B-1.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Sixth Amendment to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the Constitution of the United States

Section 1. All persons born or natural-

ized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes §54-86g (1989 Rev.)

(a) In any criminal prosecution of an offense involving assault, sexual assault or abuse of a child twelve years of age or younger, the court may, upon motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom

in the presence and under the supervision of the trial judge hearing the matter and be televised by closed circuit equipment in the courtroom or recorded for later showing before the court. Only the judge, their attorneys for the defendant and for the state, persons necessary to operate the equipment and any person who would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. The attorneys and the judge may question the child. The defendant may observe and hear the testimony of the child and may consult with his attorney, but the court shall ensure that the child cannot hear or see the defendant.

(b) If the court orders the testimony of a child to be taken under subsection (a)

of this section, the child shall not be required to testify in court at the proceeding for which the testimony was taken.

Rule 17.1, Revised Rules of the Supreme Court of the United States

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last

resortH or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

1. Nature And Procedural History Of This Case

The petitioner was tried in the Connecticut Superior Court pursuant to an information charging him with two counts of sexual assault in the first degree; Conn. Gen. Stat. §53a-70; two counts of sexual assault in the second degree; Conn. Gen. Stat. §53a-71(a)(1); and four counts of risk of injury to a minor. Conn. Gen. Stat. §53a-21. At the close of the evidence, the trial court dismissed the first and fifth counts of the information, which alleged sexual assault in the first degree. The state filed a substituted information alleging the remaining six counts. On January 15, 1986, the jury returned a verdict of guilty as to each of the six counts and,

on February 21, 1986, the trial court sentenced the petitioner to a sentence of twenty years of incarceration, execution suspended after nine years, and five years of probation. The petitioner appealed.

On October 2, 1987, the Connecticut Supreme Court remanded this case with direction to the trial court for further proceedings pursuant to State v. Jarzbek, 204 Conn. 683, 704-705, 529 A.2d 1245 (1987) cert. denied, ___U.S. ___, 108 S.Ct. 1017 (1988), in which the Court enunciated the criteria for dispensing with face-to-face confrontation in the trial of child sexual abuse cases. The trial court conducted an evidentiary hearing and ruled that the videotaped testimony of the child victims had been properly admitted.

On the merits of his appeal, the petitioner alleged that his exclusion from the witness room during the videotaping of the childrens' testimony pursuant to Conn. Gen. Stat. §54-86g violated his state and federal constitutional right of confrontation at trial.

On March 14, 1989, the Connecticut Supreme Court rejected each of the petitioner's claims and unanimously affirmed the convictions. Pet. App. at A-1 through A-44. Reargument was denied on May 16, 1989. Pet. App. at B-1.

2. Facts Underlying The Petitioner's Convictions

On November 6, 1984, B, a six-year-old male, accompanied by his nine-year-old sister G and their mother F, met with Lynn Langella, a social worker employed by the Hamden Mental Health Clinic in Hamden, Connecticut. B had

been referred to the clinic by school officials because of his inappropriate sexual "acting out" behavior. Langella's observations of B confirmed his sexually provocative behavior and, in a subsequent session, F told Langella that for the last two or three years her boyfriend, the petitioner, had been coercing her to let him have sex with the children and to let him watch while F had sex with the children. T. at 391-392.

On the next day, Langella filed a report with the Connecticut Department of Children and Youth Services (DCYS) as required by state statute. F was "very angry" with Langella for contacting DCYS and the case was referred to John McGann, another social worker at the clinic. McGann met with G and B on

November 24, 1984, and observed that B was sexually "provocative". McGann met with G alone and asked her if she minded having a male therapist. G said that she did not and "that she was only afraid of one man," the petitioner, who she said had touched her in a sexual way.

DCYS referred the case to Yale-New Haven Hospital for evaluation of G and B. Susan Rekedal, a child abuse coordinator for the hospital, interviewed F and the two children. Both children denied that they had engaged in any sexual activity and subsequent physical examinations revealed no abnormalities of G's vagina and rectum or B's rectum. However, swabs collected from each child's throat and rectum and from G's vagina, to determine the presence of venereal disease, indicated otherwise. B

tested negative for venereal disease, but the culture taken from G's throat tested positive for gonorrhea.

In light of these findings, F was asked by Susan Rekedal to return with the children to Yale-New Haven Hospital on December 31, 1984 to discuss the results. Hamden Police Detective Charles Watts also was summoned to the hospital in light of hospital findings. Dr. John Leimert, Chief Resident of Pediatrics at the hospital, informed G and F that the previous positive test meant that there had been sexual exposure. F became "very upset," "weepy," and asked G "how this could have possibly happened." G became "very anxious", "uncomfortable" and did not reply.

Rekedal then brought G into a separate room and asked her if she knew

how she got the infection. G replied that she did and that the infection had occurred since she began living in Connecticut in 1984. Through Rekedal's use of anatomically correct dolls, G then explained what had happened; she pointed to the vaginal area of the little girl doll and then touched the vaginal area with the hand of the adult male doll. Rekedal then asked G "if somebody put anything in her mouth," whereupon G paused, looked down, and then shook her head "yes." G pointed to the penis of the male doll and stated that "Bill had touched her in that way" and that it had happened more than once.

Rekedal informed Detective Watts of the interview and G was escorted into the room where F was waiting. G then looked at F, who was "upset," and

"agitated", and then recanted her statement to Rekedal. G said that she had misunderstood what Rekedal had asked her and denied that any sexual activity had occurred.

Watts and Rekedal interviewed G again, away from F. They explained to G that gonorrhea of the throat was caused by direct sexual contact between a penis and her mouth and asked her if she had recently engaged in any sexual activity. At first, G denied any sexual activity but, when asked how she could have contracted gonorrhea, she answered: "Bill gave it to me."

J, the childrens' father, learned of the police investigation in January, 1985, and was awarded temporary custody of the children. Neither G nor B mentioned anything about sexual activity

to J or his wife, A, in January, 1985, but both children suffered from severe nightmares throughout this period. In late February, 1985, G confided in A that "she was having sex all the time with Bill and [F] and that she can't tell Daddy, that she can't tell anybody, that she's been bad." G then told her father that "Bill Spigarolo stuck his penis in her butt and in her mouth and that it had happened over on Gorham Avenue with [F] and Bill Spigarolo." B also began to disclose details of the assaults in February, 1985. While the family was eating supper at home, B blurted out that the broccoli "smells like [F's] vagina." J asked B: "How do you know?" B replied: "Because she used to make me kiss it."

In subsequent interviews with the

police, both B and G overcame their initial reluctance to discuss their experiences and recounted increasingly detailed accounts of the abuse they had endured. B remembered seeing G "having to climb on Bill's pee-pee," and that, on another occasion, he saw G "laying naked on top of Mommie and that Bill kicked her." B also recalled that he saw "Bill" place his "pee-pee" in G's mouth and that "Bill put his pee-pee up my butt, put his pee-pee in my mouth" and that vaseline was placed in his "butt." At times he had to put his "pee-pee" in F's mouth and F used the "plastic pee-pee to stick up his butt." B was afraid to tell of the incidents.

G recounted a similar history of abuse. She told police that she had been sexually abused by the petitioner "a

lot" and that B had also been abused; "Bill had put his penis in [B's] mouth and in [B's] butt," and F had used a rubber penis on B. On one occasion, B was bleeding from his rectum. Further, G said that F "made love" to her brother; B was on top of his mother, who made him "slide" on her.

The childrens' accounts of this abuse was mirrored in their videotaped testimony admitted at trial, admitted under Connecticut General Statutes §54-86g. G testified that she saw the petitioner and Fran "making love" with no clothes on in the living room; that between August and December, 1984, Bill "put his penis in my vagina, my butt, and my mouth" at the Gorham Avenue apartment three or four times a week; that F would watch and hold her down "so

I couldn't get away from him; that "Bill put his dick, penis, in [B's] . . . butt; that F and the petitioner took pills and drank alcohol during the sexual activity and gave her pills; and that F made her "slide on her body" by lying on her back, with G on top of her.

F corroborated G's testimony at trial. During sexual relations with the petitioner from September to December, 1984, she suggested that they also have sexual relations with her children, including a "threesome" with G. In December, 1984, F went into G's room, awakened her and rubbed her back to "calm her down"; G was expected to "suck on [the defendant]" and F's mini-strations were to keep G from screaming. The defendant entered the room in his underwear, and put his penis by G's

mouth, who "sucked at [it]" for approximately two minutes and then moved away when she "didn't want anymore." F then "finished it" by performing fellatio on the defendant in G's presence.

REASONS FOR DENIAL OF THE WRIT

1. **THE JUDGMENT OF THE CONNECTICUT SUPREME COURT IS BASED UPON AN INDEPENDENT AND ADEQUATE STATE GROUND AND THEREFORE IS INAPPROPRIATE FOR CERTIORARI REVIEW**

An analysis of the opinion of the Connecticut Supreme Court reveals that its judgment is based not only on the United States Constitution, but also upon the Connecticut Constitution. There exists, therefore, an adequate and independent state ground for its decision sufficient to preclude certiorari review by this Court. Michigan v. Long, 463 U.S. 1032 (1983).

Indeed, the petitioner himself invoked both the federal and state constitutions in making his claim that Connecticut General Statutes §54-86g violated his right of confrontation under each of these charters. And in rejecting the petitioner's claims, the Connecticut Supreme Court's analysis consistently refers not only to the requirements of the Sixth Amendment, as construed by this Court in Coy v. Iowa, ___U.S.___, 108 S.Ct. 2798 (1988) (Coy), but also to those required under State v. Jarzbek, 204 Conn. 683, 529 A.2d 1245 (1987), cert. denied, ___U.S.___, 108 S.Ct. 1017 (1988) (Jarzbek), in which the court construed a criminal defendant's confrontation right under Article First, §8 of the Connecticut Constitution.

Jarzbek involved a child sexual abuse prosecution in which the trial court, prior to the enactment of Connecticut General Statutes §54-86g, exercised its discretion to permit the videotaping of a child victim's testimony in the absence of the defendant for later display to the jury. The procedure utilized there was virtually identical to that permitted in this case pursuant to the statute.

On appeal, Jarzbek claimed that the procedure violated both his federal and state constitutional right of confrontation. The Connecticut Supreme Court held that neither right was absolute and that "in criminal prosecutions involving the alleged sexual abuse of children of tender years, the practice of videotaping the testimony of a minor victim

outside the physical presence of the defendant is, in appropriate circumstances, constitutionally permissible." State v. Jarzbek, 204 Conn. at 704.

Those circumstances, the court held, require a showing by the state that there is a "compelling need" for so excluding the defendant. That is, the state must show by clear and convincing evidence that "the minor victim would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that the trustworthiness of the victim's testimony would be seriously called into question." 204 Conn. at 704-705.

The Connecticut Supreme Court expressly predicated its decision in Jarzbek on Article First, §8 of the Connecticut Constitution. 204 Conn. at

704-705. Indeed, the court issued the "plain statement" required by Michigan v. Long, 463 U.S. at 1042, and then remanded a series of cases, including this one, for further proceedings consistent with the Jarzbek criteria. See infra, at n.1. Thus, the reliance of the Connecticut Supreme Court upon Jarzbek in this case warrants the conclusion that it, too, is founded upon state constitutional law, even though a "plain statement" to that effect is not obvious in the decision.

It is of no moment that the Connecticut Supreme Court has relied on the federal constitution in its opinion. This is not a case in which the "non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth

to sustain the judgment without any decision of the other". Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157, 164 (1917).

A comparison of Jarzbek with this case leads quickly to the conclusion that, even if the Connecticut Supreme Court's interpretation of federal law is incorrect, then the judgment would still retain its vitality under the Connecticut Constitution, thus leading this Court to issue "nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 126 (1945); see Ake v. Oklahoma, 470 U.S. 68, 75 (1985). The Jarzbek criteria, which are manifestly more stringent than that intimated by this Court in Coy to satisfy federal constitutional dictates, themselves support the conclusion that Jarzbek's

foundation in the Connecticut Constitution is both adequate and independent of its federal foundation.

Moreover, it would appear that the objectives of Long have adequately been served when, as here, a state supreme court has issued a "plain statement" in the first of a series of cases and when subsequent cases are expressly predicated upon the holding in the first case. See e.g., State v. Bonello, 210 Conn. 51, 554 A.2d 277, cert. denied, ___U.S.___, 109 S.Ct. 2103 (1989) (noting that Jarzbek is premised on state constitution). These circumstances counsel against a grant of certiorari.[1]

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[1] Connecticut sought certiorari review of State v. Jarzbek, 204 Conn. 683, 529 A.2d 1245 (1987), cert. denied, ___U.S.____, 108 S.Ct. 1017 (1988), partly on the ground that, despite its "plain statement" of its basis in state

(continued...)

2. **THE PETITIONER HAS MISCHARACTERIZED THE RECORD WHICH, ACCURATELY PORTRAYED, DISCLOSES THAT THE CHILDREN WOULD HAVE BEEN SO SEVERELY TRAUMATIZED BY FACE-TO-FACE CONFRONTATION THAT THEY WOULD NOT HAVE BEEN ABLE TO TESTIFY AT ALL**

In his effort to convince this Court that this case presents an "ideal

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[1](...continued)
law, its analysis reflected an erroneous interpretation of federal law, possibly warranting certiorari review. See Michigan v. Long, 463 U.S. at 1044. Since that time, however, this Court has decided Coy in a manner which is consistent with, if not as stringent as, the criteria expressed in Jarzbek. Thus, the premise of Connecticut's petition for certiorari in Jarzbek, that its basis in state law was founded upon a misinterpretation of federal law, no longer is valid. Moreover, Jarzbek itself has now become entrenched in Connecticut law, thus strongly imbuing this case with interests of federalism not evident when Jarzbek was first decided in 1987. See State v. Bonello, 210 Conn. 51, 554 A.2d 277, cert. denied, ___U.S.___, 109 S.Ct. 2103 (1989); State v. Snook, 210 Conn. 244, 555 A.2d 390, cert. denied, ___U.S.___, 109 S.Ct. 3258 (1989); State v. Zwirn, 210 Conn. 582, 556 A.2d 588 (1989); State v. Lewis, 211 Conn. 185, ___A.2d___ (1989).

opportunity" to decide "what if any special circumstances will permit a court to deny the right of direct physical confrontation to an accused person in a case of child sexual abuse if the witness is physically available to testify in open court"; Petition, at 6-7; the petitioner has seen fit to misstate the record. Contrary to his assertion that "[t]he evidence of trauma to the victims in this case was not strong"; Petition, at 7; the evidence was overwhelming that each child had suffered extreme trauma as a result of the petitioner's sexual abuse and would suffer renewed trauma if forced to relive that trauma in court and in the presence of the petitioner.

This Court need look no further than the opinion of the Connecticut

Supreme Court, attached as an appendix to the petition, which discloses this trauma. Evidence adduced at trial and admitted specifically for the purpose of determining the necessity of dispensing with confrontation revealed that both children experienced severe nightmares from January, 1985 and that B had experienced such nightmares as late as 1989; that each child continued to have difficulty in discussing the sexual abuse they had endured for so long; and that the childrens' father and step-mother (who obtained custody of the children in January, 1985) were of the opinion that neither child would have been able to testify at trial at all had they been required to face the petitioner. See Pet. App. at A13-A15.

Moreover, the record reveals other

graphic and undisputed incidents when each child was reduced to hysterics when in the physical presence of their abusers prior to trial. See Pet. App. at A14-A15, A20-A21. As a consequence of this strong evidence, the Connecticut Supreme Court found that the state had proffered clear and convincing evidence that the trauma to the children was so severe that the very reliability of their testimony would have been brought into serious question had there been confrontation. Pet. App. at A20.

Thus, the petitioner's cavalier assertion that the "competing interests" which might override a defendant's confrontation "are not presented by a case like this one" flies in the face of the record. Petition, at 7-8. If anything, such a skewed representation

of the record counsels only for a denial of the writ of certiorari.

3. **THE JUDGMENT OF THE CONNECTICUT SUPREME COURT, WHICH REQUIRES A SHOWING OF NECESSITY MORE STRINGENT THAN THAT EVIDENT IN COY V. IOWA, PRESENTS AN INAPPROPRIATE CASE FOR THIS COURT TO DEFINE WHAT EXCEPTIONS TO THE RIGHT OF FACE-TO-FACE CONFRONTATION MIGHT EXIST**

The petitioner has failed to grapple with the fact that the exception to the right of face-to-face confrontation required by under Connecticut law is decidedly more stringent than contemplated by this Court in Coy. In Connecticut, this right may only give way when there is a "compelling need" to do so, supported by clear and convincing evidence. A compelling need is not shown, however, when the state can demonstrate only that a child victim will be traumatized by testifying in the presence of a defendant. Rather, the

state must show and the trial judge must find that the child would be "so intimidated, or otherwise inhibited, by the physical presence of the defendant that the trustworthiness of the victim's testimony would be seriously called into question." Pet. App. at A13.

Thus, the question in Connecticut is not simply whether a particular child witness needs "special protection," as this Court suggested would be sufficient under Coy v. Iowa, ___U.S.___, 108 S.Ct. 2798, 2804 (1988), but whether the trauma visited upon a child by confrontation would seriously undermine the reliability of that child's testimony. A child victim who, despite a strong fear of the defendant, can still testify in court must do so in Connecticut unless that fear is so pervasive that the child

cannot give complete and accurate testimony.[2]

The judgment under review, therefore, does not portray an overly expansive interpretation of federally protected rights but portrays, consistent with its adequate and independent basis in the Connecticut Constitution, a judgment according greater protections than required by the United States Constitution. "The expenditure of scarce judicial resources and the intrusion into state affairs is accordingly less justified when the state has gone too far in protecting a federal right than when the state court has failed to provide the constitutional minimum of

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[2] The Jarzbek criteria have since been engrafted upon Conn. Gen. Stat. §54-86g. See Conn. Public Act 89-177. The amendment to the statute is effective as of October 1, 1989.

protection." Harris v. Reed, ___U.S.___, 109 S.Ct. 1038, 1045 (1989) (Stevens, J., concurring).

This circumstance is compounded by other failings in the petition. Other than his inaccurate portrayal of trauma to the children as "not strong," and his characterization of this case as "ideal" for certiorari review, nowhere does the petitioner claim or even suggest that the judgment of the Connecticut Supreme Court is erroneous. See Petition, at 6-8. Nor does he explain why the judgment of that court, with which he apparently agrees, should be disturbed.

Far from providing this Court with an "ideal opportunity" to decide the limits of Coy, the petition amounts to little more than a complaint that the Connecticut Supreme Court has accorded

the petitioner greater protection of his confrontation right than that required by the Sixth Amendment. This simply is an inadequate reason for this Court to grant certiorari. Id.

CONCLUSION

For the reasons stated, this Court should deny the petition for a writ of certiorari to the Supreme Court of Connecticut.

Respectfully submitted,

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